Order Denying Plaintiffs' Motion For Class Certification Pursuant To Rule 23(B)(3) For Economic Injury Claims (C01-303) (C01-304) (C01-306) (C01-307) (C01-308) (C01-309)

09/04/2002

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE PHENYLPROPANOLAMINE (PPA) PRODUCTS LIABILITY LITIGATION, _____ This document relates to: Bowen v. Schering-Plough Corp., No. C01-303R Kamla v. GlaxoSmithKline Corp., et al., No. C01-304R, Wurz, et al. v. American Home Products Corp., No. C01-306R Anderson, et al. v. Bayer Corp., No. C01-307R French, et al. v. Bristol-Myers Squibb Co., No. C01-308R Turner, et al. v. Novartis Corp., et al., No. C01-309R	NO. MDL 1407 ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO RULE 23(B)(3) FOR ECONOMIC INJURY CLAIMS

I. INTRODUCTION

Plaintiffs filed a Motion in Support of Class Certification Pursuant to Rule 23(b)(3) for Economic Injury Claims. Having reviewed pleadings filed in support of and in opposition to the motion, along with the remainder of the record, and, being fully advised, the court finds and concludes as follows:

II. BACKGROUND

Numerous prescription and non-prescription decongestants and appetite suppressants included phenylpropanolamine ("PPA"), a drug grandfathered into the Food and Drug Administration's ("FDA") approval process, for a number of years. Beginning in 1979, case reports appeared associating PPA use with, primarily, hypertension and strokes. In the early to mid-1990s, the Yale Hemorrhagic Stroke Project ("HSP") began an epidemiological study investigating links between PPA and hemorrhagic strokes. Various drug companies sponsored the HSP in consultation with the FDA. In the midst of this ongoing study, the FDA issued a statement addressing their decision to not withdraw approval for PPA prior to the conclusion of the HSP.

The HSP ultimately found an "association" or "suggestion of an association," the meaning and scope of which is now disputed, between PPA and hemorrhagic strokes. On November 6, 2000, the FDA requested voluntary removal of PPA products from the market. The FDA also issued a public health advisory, recommending that consumers not use any PPA products. Entities responsible for manufacturing and marketing PPA products, including the defendants named here, withdrew those products from the market.

III. CLASS ALLEGATIONS

Plaintiffs seek class certification in six different PPA cases, hereinafter referred to as the "Bowen," "Kamla," "Wurz," "Anderson," "French," and "Turner" cases. Each complaint asserts claims against a different defendant, and seeks certification of two classes:

> Class I: Consumers (excluding those who assert personal injury claims and excluding residents of California) who have purchased and/or ingested Defendants' PPA products from January 1, 1994, until the date these products were no longer being sold over-the-counter.
>
> Class II: Consumers (excluding those who assert personal injury claims and excluding residents of California) who purchased and still possessed PPA products as of November 6, 2000, the date of Defendants' voluntary PPA product withdrawal (or thereafter, in the event PPA products were sold after the November 6, 2000 withdrawal).[11] Plaintiffs exclude California residents because those individuals are currently protected by similar litigation pending in

California state court.

In their class certification briefing, plaintiffs sought refunds for Class I members under theories of unjust enrichment and unfair and deceptive trade practices statutes, and refunds for Class II members under those same theories, in addition to implied warranty and revocation of acceptance of goods claims. However, in oral argument, plaintiffs essentially limited their class claims to Class II members under theories of implied warranty and unjust enrichment.[22] Plaintiffs acknowledged the greater complexity posed by Class I and identified the Class II implied warranty and unjust enrichment claims as the most manageable. The court agrees with these assessments. Plaintiffs in Wurz also brought forth an express warranty claim against defendant American Home Products. The court here assumes the continued pursuit of an express warranty claim in Wurz, but for ease of discussion will address this claim separately given its limited relevance to the opinion as a whole. As such, the remainder of this opinion will address only this single narrowed class.

Class II members claim they purchased an unmerchantable product and suffered economic injury in the amount of the price of the product purchased. They seek a refund or disgorgement of defendants' profits through restitution. Plaintiffs also seek the establishment of a fund supporting a medical research, education, and notification program.

IV. DISCUSSION

Federal Rule of Civil Procedure 23 governs class actions. Plaintiffs, as the party seeking class certification, bear the burden of demonstrating that they have met each of the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001). A trial court must conduct a "'rigorous analysis'" in order to determine whether the party seeking class certification has satisfied the prerequisites of Rule 23. Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1233 (9th Cir. 1996) (quoting In re: Am. Med. Sys., Inc., 75 F.3d 1069, 1078-79 (6th Cir. 1996)). The trial court possesses broad discretion on the question of class certification, but must exercise that discretion within the

framework of Rule 23. Zinser, 253 F.3d at 1186.
Plaintiffs assert that they meet all of the requirements of Rule 23(a) and seek certification pursuant to Rule 23(b)(3). All defendants dispute plaintiffs' satisfaction of the requirements of Rule 23(b)(3), as well as the Rule 23(a)(3) typicality requirement. The defendants named in Kamla, Wurz, Anderson, and French additionally dispute the Rule 23(a)(4) adequacy of representation requirement.[33] The defendant in French also contests the Rule 23(a)(2) commonality requirement, but the argument presented appears to relate only to putative Class I, and generally conflate the Rule 23(b)(3) predominance requirement with a discussion of commonality under Rule 23(a)(2).

A. Rule 23(b)(3):
Rule 23(b)(3) allows for class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." Valentino, 97 F.3d at 1234.

1. Questions of Law:
In determining whether common questions of law predominate, the court must analyze the substantive law to be applied to the class claims: "Understanding which law will apply before making a predominance determination is important when there are variations in applicable state law." Zinser, 253 F.3d at 1189. The court cannot rely on plaintiffs' assurances that any problems with predominance or superiority can be overcome. Castano v. American Tobacco Co., 84 F.3d 734, 742 (5th Cir. 1996). Thus, a plaintiff seeking certification of a nationwide class, implicating the potential application of many different states' laws, "bears the burden of demonstrating 'a suitable and realistic plan for trial of the class claims.'" Zinser, 253 F.3d at 1189 (quoting Chin v. Chrysler Corp., 182 F.R.D. 448, 454 (D. N.J. 1998)).
As the proposed economic injury class cases were all originally filed in this district, this court applies Washington choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487,

496 (1941); 389 Orange St. Partners v. Arnold, 179 F.3d 656, 661 (9th Cir. 1999). Washington applies a two-step "most significant relationship" test to the choice of law analysis. Johnson v. Spider Staging Corp., 87 Wn.2d 577, 580, 555 P.2d 997 (1976); Fluke Corp. v. Hartford Accident & Indem. Co., 102 Wn. App. 237, 248-49, 7 P.3d 825 (2000).

The court first evaluates "the contacts with each interested jurisdiction[,]" according to their relative importance to the particular issue. Southwell v. Widing Transp., Inc., 101 Wn.2d 200, 204, 676 P.2d 477 (1984). Contacts taken into consideration for contract claims include: "'(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.'" Pacific Gamble Robinson Co. v. Lapp, 95 Wn.2d 341, 346, 622 P.2d 850 (1980) (quoting Restatement (Second) of Conflict of Laws § 188 (1971)). The court next evaluates "the interests and public policies of potentially concerned jurisdictions." Southwell, 101 Wn.2d at 204.44"The extent of the interest of each potentially interested state should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and the particular issue involved." Southwell, 101 Wn.2d at 204. Washington courts also consider the justified expectations of the parties. See, e.g., Pacific Gamble Robinson Co., 95 Wn.2d at 346-48.

Plaintiffs assert the general uniformity of state implied warranty and unjust enrichment laws, and proffer three alternatives for choice of law management. They first argue that the court could apply the law of the various defendants' home states. See, e.g., In re Badger Mountain Irrigation Dist. Secs. Litig., 143 F.R.D. 693, 699-700 (W.D. Wash. 1992) (applying the law of state where defendants resided and did business to a multi-state class action); Avery v. State Farm Mutual Auto. Ins. Co., 746 N.E.2d 1242, 1254-55 (Ill. Ct. App. 2001) (affirming certification of nationwide consumer fraud class under the state law of the defendant's place of residence).55Plaintiffs distinguish the Seventh Circuit's recent opinion in In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1018-21 (7th Cir. 2002), in which that court rejected the

application of the defendant's home state's law. They note that Indiana applies the more restrictive lex loci delecti test, which "in all but exceptional cases [] applies the law of the place where the harm occurred[,]" and does not take into consideration the justified expectations of the parties or the interests of the relevant states in having their law applied. See id. at 1016. Plaintiffs alternatively argue that the court could apply only the law of Washington. See, e.g., Cheminova Am. Corp. v. Corker, 779 So.2d 1175, 1182 (Ala. 2000) (upholding application of the uniform principles of the Uniform Commercial Code ("U.C.C.") and basic contract and equity principles to a nationwide class); Gordon v. Boeden, 586 N.E.2d 461, 466 (Ill. Ct. App. 1991) (noting that the trial court could apply the forum state's law to the multi-state action if it found significant contact between that state and the claims asserted).

Third, and finally, plaintiffs assert that the court could apply the laws of multiple jurisdictions through a subclassing plan. See, e.g., In re Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 287, 291-94 (S.D. Ohio 1997) (certifying multiple subclasses to account for differences in state medical monitoring, negligence, and strict liability laws); Cheminova America Corp., 779 So.2d at 1182 (upholding creation of two subclasses to manage state implied warranty law privity requirement variations). Plaintiffs propose the creation of subclasses for each cause of action, while eliminating residents of any state where the variations in state law were determined material to the cause of action. The proposed "Unjust Enrichment Subclass" would include all Class II members. See Singer v. AT&T, Corp., 185 F.R.D. 681, 692 (S.D. Fla. 1998) (deeming unjust enrichment a "universally recognized cause[] of action that [is] materially the same throughout the United States"); Declaration of Murray T.S. Lewis in Support of Plaintiffs' Motion ("Lewis Decl."), 6.B. (all jurisdictions agree that unjust enrichment occurs when defendant acquires benefit inequitably or through wrongdoing, and that principles of equity provide for restitution or disgorgement as remedy). The "Implied Warranty Subclass" would exclude only residents of Louisiana, as all other states have adopted the same implied warranty sections of the U.C.C. See Lewis Decl., Ex. 6.A.66 See also Lewis Decl., Exs. 6.E-F. (all jurisdictions, except Louisiana, have expressly adopted U.C.C. § 2-313 as to breach of express warranty;

Louisiana has adopted an express warranty definition similar to U. C.C. § 2-313; and 48 jurisdictions recognize express warranty created by advertising, while it remains an open question in 3 jurisdictions). States with an implied warranty privity requirement could be further subclassed, or the court could include only the non-privity requirement state residents. See Declaration of Murray T.S. Lewis in Support of Plaintiffs' Reply ("Lewis Reply Decl."), Ex. 1 77 The parties submitted charts outlining state implied warranty privity requirements, but reached different conclusions with respect to a handful of states. Compare Lewis Reply Decl., Ex. 1 and Declaration of D. Joseph Hurson in Opposition to Plaintiffs' Motion ("Hurson Decl."), Ex. H.

In support of their subclassing alternative, plaintiffs point to a Ninth Circuit decision in which the court minimized the variations between, inter alia, state implied warranty laws:

> In this case, although some class members may possess slightly differing remedies based on state statute or common law, the actions asserted by the class representatives are not sufficiently anomalous to deny class certification. On the contrary, to the extent distinct remedies exist, they are local variants of a generally homogenous collection of causes which include products liability, breaches of express and implied warranties, and 'lemon laws.' Individual claims based on personal injury or wrongful death were excluded from the class. Thus, the idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims.

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022-23 (9th Cir. 1998). Defendants contend that, under Washington choice of law rules, the places of purchase would possess the most significant relationships to the claims at issue. See, e.g., Spence v. Glock, GES.m.b.H., 227 F.3d 308, 311-12, 314 (5th Cir. 2000) (applying "'most significant relationship test'" and finding economic injury in a nationwide class action concerning an alleged defect in guns "occurred when and where plaintiffs bought the guns."); Clay v. American Tobacco Co., Inc., 188 F.R.D. 483, 497-98 (S.D.

Ill. 1999) (finding place of cigarette purchase would be place of injury). As such, defendants reject the viability of plaintiffs' first two proposed choice of law alternatives.88 Defendants contend that the application of a single state's laws, or only the laws of defendants' home states, would be unfair to putative class members whose home states arguably provide stronger protection for consumers. See, e.g., Spence, 227 F.3d at 314. They also assert general due process problems raised by these alternatives. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) ("'for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.'") (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981)). They note that a state, through its choice of laws rules, "may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement [for a class action] that there be a 'common question of law.'" Id. at 819-21 (rejecting application of Kansas law to claims of all class members in a multi-state class action, despite the fact that the defendant owned property and conducted "substantial business" in Kansas). See also In re Ford Motor Co., Bronco II Prod. Liab. Litig., 177 F.R.D. 360, 371 (E.D. La. 1997) (hereinafter "Bronco II") (considering Shutts and holding that the law of the manufacturer's home state could not be applied in a nationwide consumer class action asserting economic injury claims). Defendants also reject the proposed subclassing plan based on their assertion that significant variations exist between state implied warranty and unjust enrichment laws. See, e.g., Walsh v. Ford Motor Co., 807 F.2d 1000, 1016 (D.C. Cir. 1986) ("'The Uniform Commercial Code is not uniform.'") (quoting J. White & R. Summers, Uniform Commercial Code 7 (2d ed. 1980)); Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 605 (S.D.N.Y. 1982) ("even within the U.C.C. implied warranty umbrella, state law may differ");99 See also Chin, 182 F.R.D. at 460 (noting variations in warranty laws); Bronco II, 177 F.R.D. at 369 (same); In re Ford Motor Co. Ignition Switch Prods. Liab. Litig., 174 F.R.D. 332, 351 (D. N.J. 1997) (hereinafter "Ignition Switch") (same). and Clay, 188 F.R.D. at 501 ("variances exist in

state common laws of unjust enrichment.") They point to warranty law variations in determining merchantability, privity requirements, reasonable notice, and the burden of proof on notice. See Hurson Decl., Ex. H. They note that unjust enrichment laws vary in the actual definitions of that claim, as well as with respect to the availability and scope of defenses. Id., Ex. I. Defendants argue that these variations would "swamp any common issues and defeat predominance." Castano, 84 F.3d at 745. See, e.g., Chin, 182 F.R.D. at 459-61. The court finds little support for the first and second alternatives proffered by plaintiffs for choice of law management. Almost all of the contacts relevant to these claims occurred within the states of purchase. See Pacific Gamble Robinson Co., 95 Wn.2d at 346.[10] [10] Contrary to plaintiffs' assertion, the court does not deem these contacts to be simply fortuitous. See Spence, 227 F.3d at 315 ("Generally, the place of injury (*i.e.*, the place of purchase) in this class action case will neither be fortuitous nor the only contact with a particular state. . . . The exception to this guideline comes where the place of injury is fortuitous or bears little relation to the occurrence and the particular issue. In an economic loss case, that cannot be said to be true.") (internal citation omitted). Those states presumably have significant interest in consumer claims associated with purchases made within their borders. Moreover, the consumers themselves would likely expect that their claims would be governed by the laws of the states wherein they purchased the products at issue. As such, the court concludes that, pursuant to Washington choice of law rules, the places of purchase possess the most significant relationships to the individual class members' claims. See, e.g., Spence, 227 F.3d at 311-12; Clay, 188 F.R.D. at 497-98.[11] [11] On the whole, the court finds the case law proffered by plaintiffs in support of their first and second alternatives distinguishable. See, e.g., In re Badger Mountain Irrigation Dist. Secs. Litig., 143 F.R.D. at 695, 699-700 (involving securities fraud in which the overwhelming weight of contacts were with the State of Washington, investors who had all invested in bonds to finance the development of an irrigation system in Washington, and state law which favored the putative class members). See also infra note 12.

Thus, the court must consider the viability of the third alternative proposed by plaintiffs and, as such, the potential

application of the laws of forty-nine states and the District of Columbia to the class claims. See Zinser, 253 F.3d at 1189. In so doing, the court finds that, although providing a foundation for dealing with state law variations and for adopting a suitable trial plan, plaintiffs have not gone far enough to satisfy the requirements of Rule 23.

Plaintiffs demonstrated general similarity between state implied warranty and unjust enrichment laws, see Lewis Decl., Exs. 6.A-B., E-F., outlined the elements and evidence to be offered in support of their claims, and offered a subclassing plan, including two subclasses and a privity sub-subclass. They suggested that any material variations could be dealt with by elimination of state residents from the subclasses on that basis. Plaintiffs also correctly noted that the Ninth Circuit recognized that state implied warranty laws are "local variants of a generally homogenous collection of causes." Hanlon, 150 F.3d at 1022. However, the Ninth Circuit decided Hanlon in the context of a class settlement. As such, the court was not faced with the task of inquiring into "whether the case, if tried, would present intractable management problems." See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997). Likewise, given the agreed upon settlement, the parties themselves did not contest the issue of state law variations or the potential for associated trial management problems.

Indeed, while Hanlon recognized that "[v]ariations in state law do not necessarily preclude a Rule 23(b)(3) action," the court also held that "class counsel should be prepared to demonstrate the commonality of substantive law applicable to all class members." 150 F.3d at 1022 (citing Shutts, 472 U.S. at 821-23). Here, while plaintiffs demonstrated general state law similarity, defendants pointed to state implied warranty and unjust enrichment law variations through survey evidence of their own. See Hurson Decl., Exs. H-I. Yet, plaintiffs did not address these variations and, thus, did not argue against their significance or materiality to the class claims. Their assertion that state residents may be eliminated in the event material variations are identified does nothing to resolve the issue as to whether those variations actually exist. Therefore, the court finds that plaintiffs have not provided sufficient information for the court to conclude that state implied warranty and unjust enrichment law variations are neither significant nor material to the issues in

this case. Cf. In re Telectronics Pacing Sys., Inc., 172 F.R.D. at 278-79, 291-94 (requiring plaintiffs to, among other things, demonstrate how the case could be managed in light of state law variations, and reaching determination on significance and materiality following the provision of detailed information from the parties on this issue).12 12 The court also finds the bulk of state law variation case law cited by plaintiffs distinguishable either due to their unusual nature, or because they rest on state class certification laws differing from Rule 23 in significant respects. See, e.g., In re School Asbestos Litig.,789 F.2d 996, 1011 (3d Cir. 1996) (involving "the highly unusual nature of asbestos litigation"); In re Copley Pharm., Inc., 161 F.R.D. 456, 465 (D. Wyo. 1995) (involving a single product, a single defendant, and an admission as to product contamination); and Cheminova America Corp., 779 So.2d at 1181 (requiring only that, to predominate, common issues must constitute a "significant part" of individual class member's claims); Singer, 185 F.R.D. at 691-92 (finding choice of law issues premature for consideration at the certification stage); Tesauro v. Quigley Corp., 2002 WL 372947, at *8 (Pa. Com. Pl. Jan. 25, 2002) (noting that Pennsylvania class certification law does not grant consideration as to potential management difficulties "a great deal of weight."); Gordon, 586 N.E.2d at 466 (stating that, under Illinois law, "[t]he question of whether laws of different states apply to specific transactions . . . will not ordinarily prevent certification[,]" and that the state law issue constituted merely a "hypothetical problem that might arise in the future."); accord Avery, 746 N.E.2d 1242 (also applying Illinois law).

Moreover, by leaving open the question as to whether state law variations may be deemed significant or material, plaintiffs also left unanswered the question as to whether additional subclasses may be more appropriate than wholesale elimination of various state residents.13 13 The question as to which states contain an implied warranty privity requirement also remains an open question given the disparities in the parties' representations on this subject. See supra n. 7. Consequently, they failed to provide the court with, for example, sample jury instructions or verdict forms that would assist the court in managing the case in the event significant variations resulted in the creation of additional subclasses. See, e.g., Chin, 182 F.R.D. at 458 (noting

plaintiffs' failure to provide sample jury instructions or special verdict forms); Ignition Switch, 174 F.R.D. at 350 (same).

Finally, plaintiffs failed to identify appropriate representatives for the existing proposed subclasses and sub-subclass, or to specifically demonstrate that these subclasses satisfy all of the requirements of Rule 23. See Zinser, 253 F.3d at 1190 (upholding trial court finding that plaintiffs had not offered a manageable trial plan given the potential application of multiple state laws and had, instead, simply suggested subclasses without naming subclass representatives or demonstrating that each subclass met the requirements of Rule 23);[14] [14] The fact that Zinser included personal injury claims does not alter the significance of the court's holdings with respect to the requirements for class certification. accord In re Telectronics Pacing Sys., Inc., 172 F.R.D. at 278 (noting that the court had required plaintiffs to come forward with exact definitions of subclasses, representatives for those subclasses, and the reasons why each subclass satisfied Rule 23 prior to certification). In comparison, the plaintiffs in Hanlon had not only proposed representatives for potential subclasses, but had even named representatives from each state. 150 F.3d at 1020-21.[15]

[15] The court also notes that a number of the named plaintiffs identified in the class certification briefing do not appear to possess any proof of possession of a PPA product as of November 6, 2000. Although the court need not here address plaintiffs' proposal for fluid recovery, it does advise plaintiffs that rule 23 does not permit "dispensing with individual proof of damages." Six Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1305 (9th Cir. 1990).

For all of these reasons, the court finds that plaintiffs neither adequately demonstrated the predominance of common issues of law, nor provided the court with a trial plan suitable at the class certification stage. Given their failure to satisfy these burdens, the court finds it unnecessary to address either the questions of fact or superiority aspects of Rule 23(b)(3), or any of the requirements of Rule 23(a).

V. CONCLUSION

The court hereby DENIES plaintiffs' motion for class certification based on plaintiffs' failure to demonstrate

satisfaction of Rule 23(b)(3).

DATED at Seattle, Washington this 2nd day of September, 2002.

/s/

BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE